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No. 06-147

IN THE

Supreme Court of the United States

AT HOME CORPORATION,
Petitioner,

v.

COX COMMUNICATIONS, INC., COX@HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATION, INC., COMCAST PC INVESTMENT, INC., BRIAN L. ROBERTS AND DAVID M. WOODROW,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Court should grant the petition to resolve important unsettled questions of federal securities law involving the continued vitality and application of § 16(b) of the Securities Exchange Act of 1934, the "short swing" insider trading statute, to the largest insider trading profit -- over $600 million -- ever realized by corporate insiders, and to close a

dramatically expandable loophole created by the Second Circuit's decision. The Court should also grant the petition to clarify the statutory definition of a basic but critical term in the federal securities laws -- "purchase" -- which has broad applicability throughout federal securities regulation.

Respondents, two of the largest cable companies in America, argue at great length that the issues here are unimportant and unworthy of this Court's attention. Unwittingly, Respondents' arguments do much to underscore the importance of resolving the issues presented here. Respondents spend pages discussing the amicus brief submitted by the United States Securities and Exchange Commission ("SEC") to the Second Circuit, yet they omit the undeniable fact that the SEC submitted an amicus brief to the Second Circuit precisely because this case raises "issues of significance to the administration of the federal securities laws." *See* Commission Amicus/Friend of the Court Briefs, http://www.sec.gov/litigation/briefs/amicusrequest.htm. Indeed, the SEC's amicus brief submitted below at the invitation of the Second Circuit was one of the three filed for the entire year to date that the SEC has chosen to highlight on its website. *See* Request for Commission Amicus Participation in a Pending Case, http://www.sec.gov/litigation/amicus briefs.shtml.

While Respondents also assert that the issues presented are settled, that is not the position Respondents' counsel has taken in a leading § 16 trade publication that they publish. In that publication, the issues presented by this action are described as follows:

> Hybrid derivative instruments provide the holder with the right to exercise the instrument at a fixed or floating price, whichever is most advantageous to the holder. Because these instruments contain an element found in derivative securities (i.e., a fixed price), as well as an element found in non-derivative securities (i.e., a floating price), *courts*

> *have struggled with their treatment under Section 16(b). The uncertainties and conflicting decisions regarding these instruments*, which are discussed in Section 3.03[5][f][iii] (at pages 246-48) of our *Section 16 Treatise and Reporting Guide*, *apparently led the Second Circuit to seek the SEC's guidance* with respect to five specific issues relating to controversy in this case.

Peter J. Romeo & Alan L. Dye, *Section 16 Updates*, Vol XVI, No. 1 at 11 (March 2006) (emphasis added). A later issue of the same trade publication confirms that this case involves the "largest [claim] in the history of Section 16(b)," and further asserts that while "the treatment of hybrid securities is now settled in the Second Circuit, it remains an open issue in the Third Circuit due to a contrary decision issued by a district court in 2000 in *Levy v. Clearwater Fund IV, Ltd.*" Peter J. Romeo & Alan L. Dye, *Section 16 Updates*, Vol. XVI. No. 2 at 7, 9 (June 2006).

The Court should grant the petition to address for the first time in 15 years a statute passed over 70 years ago as part of the sweeping reform of the securities markets and in a direct effort to prevent exactly what occurred here: insiders reaping enormous and outsized gains from selling and buying securities of a corporation within a six-month period. *See* 15 U.S.C. § 78p(b).

ARGUMENT

I. THE PETITION PRESENTS IMPORTANT QUESTIONS UNDER THE FEDERAL SECURITIES LAWS THAT SHOULD BE RESOLVED

A. Count I

Respondents make no attempt to refute, nor could they, that this case arises out of insiders admittedly reaping the largest ever profit from buying and selling the securities of a

single company in United States history. We are aware of none bigger that has been challenged under § 16(b).

As described in more detail in the petition, as part and parcel of a change of control transaction, Cox and Comcast entered into a "put" agreement to sell all or some of their At Home common stock to another At Home insider, AT&T, at $48 per share or at a higher price. The Complaint alleges in Count I that the "put" became a "derivative security" and hence became a "sale" for purposes of § 16(b) when Cox and Comcast triggered the exercise of the put which, based on market prices for At Home stock at the time, set the number of shares to be sold and the price per share for the first time. Cox and Comcast were subsequently paid billions of dollars to cancel the put -- a "purchase" -- and they admittedly obtained over $600 million in profits from this cancellation.

Far from presenting unimportant questions that could be resolved easily from the face of the statute or from SEC rules, the first cause of action in the Complaint centered around the unresolved question of when the § 16(b) six-month clock starts to tick for derivative instruments such as the put at issue. The instrument created by Respondents in an attempt to evade § 16(b) liability leaves open the critical terms of any securities transaction -- the exact number of shares to be sold and the price per share -- until after a notice of exercise is sent. By waiting to "purchase" the securities until six months had passed from the creation of this instrument, Respondents contended and the Second Circuit agreed that they had escaped all liability under § 16(b). The importance of this issue is not in any way diminished by the Complaint's allegations that the put at issue here had certain unique characteristics. The instrument is easily replicated. If the Second Circuit principles are upheld, there is little doubt that the loophole

created will invite copycat instruments also designed to evade § 16(b) liability.[1]

The Second Circuit erred in not adopting the approach advocated by Petitioner: that a sale for § 16(b) purposes occurred both when the put was created and later when Cox and Comcast gave notice of their intent to sell shares under the put, thus setting the price and number of shares to be sold for the first time. This analysis is consistent with the wording of the statute and consonant with its purpose. Because Respondents cannot meet this argument on the merits, Respondents spend page after page contending that this argument is improperly raised here for the first time. In fact, Petitioner developed and advanced the above approach in the Court below.[2] Regardless, this Court has explicitly stated that "[the] traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)); *see also Lebron*, 513 U.S. at 379 ("[Petitioner's] contention that Amtrak is part of the Government is in our view not a new claim within the meaning of that rule, but a new argument to support what has been his consistent claim").

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[1] Respondents' contention that the issues presented under § 16(b) do not involve a conflict among Circuit Courts is not supported. Indeed, as noted above, Respondents' counsel concedes in their § 16 publication that the Circuit Courts remain unsettled on the treatment of so-called "hybrid" derivative securities under § 16(b). Moreover, historically, the decided majority of § 16(b) litigation finds a home in the courts of the Second Circuit. To avoid review of § 16(b) decisions because of a lack of conflict among circuits is essentially to conclude that this Court will be unwilling to hear important issues under § 16(b).

[2] *See* Appellants Letter Brief in Response to the SEC Amicus Brief dated 3/3/06 at 4, *At Home v. Cox Commc'ns, Inc.*, 446 F.3d 403 (2d Cir. 2006) (No. 05-0115-cv).

The Court should grant the petition to remove the uncertainty surrounding the application of § 16(b) to derivative instruments created by the Second Circuit's decision.

B. Count II

The SEC's amicus brief also addressed the significant issue under Count II of whether the definition of the term "purchase" in § 3(a)(13) of the Exchange Act, which includes "any contract to buy, purchase or *otherwise acquire*" a security, should be accorded its plain meaning. 15 U.S.C. § 78c(a)(13) (emphasis added). The Second Circuit refused to give the definition its plain meaning and instead held that where a company "acquires" stock of an issuer held by another company which it purchases, that acquisition is somehow excluded from the ambit of the definition because the transaction was not likely motivated by a desire to acquire the securities.

Recognizing that granting a petition to resolve and clarify the definition of the term "purchase" under the securities laws is the paradigmatic case taken by this Court for review,[3] Comcast attempts to muddy the issue presented by asserting, contrary to the plain language of the Second Circuit's opinion, that "the Second Circuit's dismissal of [Count II] was based upon a strict, plain-language reading of the term 'issuer' in Section 16(b)" -- not the definition of the term "purchase." Comcast Br. at 22. This is revisionist history. It

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[3] The Supreme Court has often taken up cases in order to clarify the meaning of definitions within the federal securities laws. *See Landreth Timber Co. v. Landreth*, 471 U.S. 681, 690 (1985) (holding that when an instrument falls plainly within the statutory definition of a security, "[t]here is no need . . . to look beyond the characteristics of the instrument to determine whether the Acts apply"; *Reves v. Ernst & Young*, 494 U.S. 56, 62-63 (1990) (providing test to define "any note"); *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946) (providing test to define "investment contract").

ignores the holding by the Second Circuit expressly rejecting Petitioner's lead argument below that Comcast's acquisitions of other cable companies which, in turn, also owned At Home securities were § 16(b) "purchases" of At Home securities. See Pet. App. at 13a. The Second Circuit's decision to "reject At Home's effort to treat Comcast's cable system acquisitions as section 16(b) purchases" squarely presents the Court with the opportunity to address the meaning of "purchase" under the securities laws. *Id.*

Comcast cannot dispute that the Second Circuit's failure to give plain meaning to the phrase "otherwise acquire" in the definition of "purchase" has far reaching consequences for § 16(b). The departure by the Second Circuit from the "plain meaning" approach mandated by this Court and adopted by other Circuits in interpreting the definitional terms in the securities laws should be corrected. In addition, based on the Second Circuit's ruling, companies will now drop securities holdings into separate corporate entities and buy and sell those entities, thus enabling them to "dispose of" and "acquire" stock without triggering liability under § 16(b). There is no statutory basis for this loophole. It should be closed.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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